



**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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CAROLYN BAILEY/MILTON EDUCATION :  
ASSOCIATION, NEA-NEW HAMPSHIRE :

Complainant :

v. :

MILTON SCHOOL DISTRICT :

Respondent :

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CASE NO. T-0293:8

DECISION NO. 94-106

APPEARANCES

Representing Milton Education Association:

Steven Sacks, Esq.

Representing Milton School District:

Bradley Kidder, Esq.

Also appearing:

Sheldon Damon, SAU #64  
Donald Desmarais, SAU#64  
Theodore Wells, NEA-NH  
Carolyn Bailey

BACKGROUND

Carolyn Bailey (Bailey) and the Milton Education Association (Association) filed unfair labor practice (ULP) charges against the Milton School District (District) on June 1, 1994 alleging violations of RSA 273-A:5 I (a), (c), (g) and (h) resulting from anti-union animus which, in turn, caused Bailey to be non-renewed. The District filed its answer on June 7, 1994 after which this case was heard by the PELRB on September 20, 1994 and October 12, 1994 following a continuance sought and granted for the earlier hearing

date of August 4, 1994.

FINDINGS OF FACT

1. The Milton School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.
2. The Milton Education Association is the duly certified bargaining agent for teachers employed by the District.
3. Carolyn Bailey was employed by the District as an English and social studies teacher during the 1992-93 school year. She was "evaluated" three times during the 1992-93 school year by "lesson observations" on December 21, 1992 and June 21, 1993 and by a teacher performance evaluation summary on February 21, 1993. All three documents were authored by her principal, Donald Desmarais. All were very positive and included comments such as (December 12, 1992), "this was an excellent example...", "the students seemed excited and were quickly on task," "the teacher was keenly aware of student involvement," "the instructional presentation was excellent," "the lesson was well paced," "the teacher...did an excellent job throughout the lesson," (February 21, 1993) "fortunate to have you as a member of our school community," "valuable asset to the core team," "you have provided direction and leadership," "you have shown both patience and understanding," (June 21, 1993) "excellent job preparing students," "excellent class and well controlled," and "you are an excellent teacher and have contributed to making our middle school what it is." Association Exhibits No. 1, 2 and 3. All objective measurements in both professional and instructional categories were marked the highest possible choice, "satisfactory," on the February 21, 1993 evaluation. It recommended continued employment. Association Exhibit No. 3.
4. On June 24, 1993 during final exams, Bailey commented to hall monitor Carol D'Anna that Eban Soule, one of several boys shooting baskets in the gym, did not respond promptly to a request to put away the athletic equipment and complained that "Eban never listens to what he's told the first time." Board Exhibit No. 1. Bailey's comments to D'Anna were overheard by Soule's mother, Nan Soule, who spends an unusual amount of time in and about the school premises as a volunteer for extra-curricular activities. Nan Soule, in what she characterized as an altercation (Board Exhibit

- No. 2, page 6), confronted Bailey about her statement relating to Eban. Bailey, due to be elsewhere, attempted to respond to Nan Soule when voices went from "raised", according to Bailey, to "yelling," according to Soule. Bailey reported this incident to Desmarais promptly since he was aware of it before receiving a six page handwritten letter of complaint from Nan and Gerry Soule dated June 28, 1993. Board Exhibit No. 2. Bailey was unaware of this written complaint until mid-July when she received a memo from Desmarais dated July 22, 1994 advising her that Nan Soule had filed a "formal complaint" with Superintendent Damon and the Milton School Board. Board Exhibit No. 3. Desmarais cited the June 24, 1993 incident as being "of particular concern" and concluded that Bailey's "behavior in this situation was not appropriate and I would hope you would contact Mrs. Soule and make your apology." On July 27, 1993 Superintendent Damon wrote a letter to "Mr. & Mrs. Jerry [sic] Soule" telling them that they "can expect a letter of apology from Mrs. Bailey and I will be receiving a written reprimand from Mr. Desmarais that will be placed in [Bailey's] personnel file." Board Exhibit No. 4. Bailey wrote an apology to Nan and Gerry Soule on July 27, 1993. There is no evidence of a letter of reprimand ever having been given to or placed in Bailey's personnel file, unless Board Exhibit No. 3, which makes no reference to or use of the word "reprimand," was considered by some to be such a document.
5. Bailey was again employed by the District for the 1993-94 school year. Desmarais observed her on October 19, 1993 and authored a lesson observation form which included commentary such as "the materials prepared by the teacher were excellent organizational tools," "this was an excellent lesson on writing.... well planned and executed," "atmosphere...conducive to a good learning environment," and "please invite me back." Association Exhibit No. 4.
  6. Demarais completed a teacher performance evaluation summary on Bailey for 1993-94 on March 15, 1994. This was the first time he ever documented less than satisfactory performance or an attitude problem on the part of Bailey. In this document, Desmarais rated Bailey as "needs improvement" in two professional (prepares reports accurately and on time, positive school-community relations) and three instructional (shares idea, is sensitive to feelings of students and co-workers, demonstrates educational initiative)

areas. All other areas were rated "satisfactory," the highest of the possible choices. In his commentary, Desmarais concluded "her second [year of teaching] has not been quite so successful [as her first]." He added:

Other areas of concern that has [sic] affected her performance includes participating in a political work related activity of the teachers' union, being critical of the school and the lack of community support for the school. Though she has done well in the classroom, there are other factors that contribute to being a successful teacher. These include public relations, relating to parents and colleagues, attending to administrative detail and duties and attitude which has been quite negative. (Emphasis added)

Even though this is the first documented criticism of Bailey's performance in Association Exhibits No. 1-5, inclusive, Desmarais was sufficiently concerned that he did not recommend her for continued employment for 1994-95. Association Exhibit No. 5. Referring to the reference Desmarais made concerning Bailey's participation in a "political work related activity of the teachers' union" in Association Exhibit No. 5, Damon told Desmarais, "it was an unfortunate use of language."

7. Although not mentioned or documented in his written evaluations prior to March 15, 1994 (Assn. Exhibit No. 5), Desmarais testified that he had previous concerns with Bailey's performance relative to parent complaints in school year 1993-94, her complaining about the lack resources and community support in staff meetings, and late submission of working papers and a request for payment for her summer curriculum work. In his testimony, Desmarais characterized Bailey's October 19, 1993 evaluation (Assn. Exhibit No. 4) as "very good." It reflected none of the criticisms he cited, as referenced earlier in this paragraph. Likewise, there is no evidence of any written documentation of corrective measures for or counseling of, Bailey relative to these matters prior to the issuance of Association Exhibit No. 5. Bailey was not alone in her criticism of lack of resources during staff meetings. There is no evidence that other teachers who complained about insufficient resources were criticized, counseled or non-renewed for doing so.
8. Desmarais testified that he did not mean what he said about Bailey's participation in "a political work related activity of the teachers['] union," that he

was referring to her standing with other teachers in a "work to rule" demonstration, and that that could be construed as her criticizing the school and lack of community support. He added, "I consider her participation in 'work to rule' as a problem." He concluded that Bailey's classroom work "continued to be excellent throughout the two years."

9. Other teachers, in addition to Bailey, participated in the "work to rule" activities referenced by Desmarais. There is no evidence that any of them were criticized, counseled or non-renewed for their participation in that activity.

#### DECISION AND ORDER

The complainants in this matter claim that Bailey's non-renewal is violative of RSA 273-A:5 I (a), (c), (g) and (h). While we acknowledge that there is great latitude accorded to school boards to non-renew non-tenured teachers and that no reason for such non-renewal need be given, Brown v. Bedford School Board, 122 N.H. 627 (1982), the conduct in this case is so egregious and so blatant, we believe the ULP charge has merit.

Our concern is twofold. First, the comments by Desmarais on Association Exhibit No. 5 that he was concerned with Bailey's "participating in a political work related activity of the teachers' union" not only exceeded the bounds of propriety but also had a chilling effect not only on her participation but on the potential participation of others as well. Second, these sentiments were reiterated when Desmaris testified on October 20, 1994 that he "perceive[d] her participation in union political activity to be a problem." The same result obtains; this has a chilling effect not only on Bailey but also possibly on other participants, or would-be participants, who become aware of what happened to Bailey as the result of her meeting with other teachers, prior to the beginning of their respective work days, to demonstrate their concerns about resolving a yet-to-be-concluded CBA.

As we look at the facts of this case, there is no need to make or rely on inferences from the principal's commentary; the record is unequivocal. Desmarais said he was concerned about Bailey's "participation" and that it had "affected her performance," notwithstanding that it was not during working hours and he nevertheless said that her classroom work "continued to be excellent throughout the two years," which, implicitly, continued to the end of school year 1993-94. In the words of complainant's counsel in closing, this case is complete with the proverbial "smoking gun."

Roberts Dictionary of Industrial Relations, 4th Ed., defines

"chilling effect" as "any practice or action by an employer which denies, discourages, or inhibits individuals of their employment rights, or the exercise thereof." This clearly happened to Bailey at a time when, while she was not yet a "tenured" teacher, she was clearly a "public employee" within the meaning of RSA 273-A:1 IX. She had been employed more than twelve months and was no longer "probationary" within the meaning of RSA 273-A. While there may have been collateral "chilling effects" on other members of the bargaining unit as the result of the action taken on Bailey, we make no finding as to this since evidence was not presented and a remedy was not sought on that issue.

In addition to the "chilling effect" of the principal's evaluation and its being cited as one of several areas of concern causing him not to recommend her Bailey continued employment, we find that his comments also evidenced anti-union animus. We do not accept the district's position that the pre-school "work to rule" meeting/demonstration was not a union activity. The evidence is uncontroverted that the group of teachers, joined by Bailey, was concerned about the resolution of their yet-to-be concluded CBA. Interference with their expressing their concerns is violative of RSA 273-A:5 I (a), (b) although not pled, (c) and (g), as (g) refers to and incorporates the purposes of the former Chapter 490:1 of 1975 which affirmed the rights of public employees to organize.

Lastly, this is not a case of degree. The animus was manifest from Association Exhibit No. 5. Unlike Appeal of White Mountains Education Association, 125 N.H. 771 at 777 (1984), here there is "linkage" between Bailey's non-renewal and her participation in "political work related activity of the teachers' union." Association Exhibit No. 5 said it! Her participation was a reason for her non-renewal. Under Appeal of White Mountains Education Association, this fulfills the requirements of being a prima facie case of improper motivation "to any degree." The improper conduct must have been a "motivating influence to some minimal degree." (125 N.H. 771 at 777). The principal's conduct met and exceeded this standard. We need go no further to determine whether the improper motivation was the cause; it was a cause and that is sufficient to sustain a finding of ULP against the employer.

For the foregoing reasons, we find that the employer's conduct, as represented by Association Exhibit No. 5, violated RSA 273-A:5 I (a), (c) and (g). We make no finding as to RSA 273-A:5 I (b) as it was not pled. By way of remedy, we direct that the employer and its agents (1) CEASE and DESIST from conduct which restrains employees in the exercise of rights protected by Chapter 273-A and (2) reinstate and make whole, to the date of reinstatement, Carolyn Bailey forthwith, commencing with the start of the 1994-95 school year. This remedy is not intended to confer more than re-employment on Carolyn Bailey nor is it intended to restrict the District from exercising its authority under RSA 189 when determining whether to re-employ her for the 1995-96 school

year. She does not attain tenure hereby and must satisfactorily complete the current school year in order to attain it.

So ordered.

Signed this 14th day of DECEMBER, 1994.

  
EDWARD J. HASELTINE  
Chairman

By unanimous vote. Chairman Edward J. Hasseltine presiding.  
Members E. Vincent Hall and Frances LeFavour present and voting.